78-1917

No.

Supreme Court, U. S.
FILED
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In the

Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinion by Judge Tone

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 16, 1979.

Before

Hon. PHILIP W. TONE, *Circuit Judge*

Hon. DONALD P. LAY, *Circuit Judge**

Hon. WILLIAM J. BAUER, *Circuit Judge*

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellants,

vs.

No. 78-1941

JAMES R. THOMPSON, as Governor of Illinois, et al.,

Defendants-Appellees, and

ALLEN HARTMAN, et al,

Intervening Defendants-Appellees.

---

* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1036

PRENTICE H. MARSHALL, *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND E. TRAFELET, et al.,

Plaintiffs,

v.

JAMES R. THOMPSON, et al.,

Defendants.

No. 78 C 1036

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

INTRODUCTION

In this civil rights action brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (3), two classes of plaintiffs, one represented by four judges of the Circuit Court of Cook County, Illinois, and another represented by three Illinois voters resident and registered in Cook County, Illinois, challenge the constitutional validity of an Act of the Illinois General Assembly, entitled "An Act relating to the compulsory retire-

ment of judges" (sometimes hereinafter "the Act"), which mandates the retirement of Illinois judges at age 70. Plaintiffs' principal contention is that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Act provides:

> "§ 1. A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.
>
> "§ 2. The Provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70. The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> "Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matter." Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977).

On May 22, 1978, we determined that the action be maintened as a class action pursuant to Rule 23(b) (2), both as to a class represented by the plaintiff judges, and as to a class represented by the plaintiff voters.

The judge plaintiffs have been certified to represent and to bring this action on behalf of a class composed of all judges of the Supreme, Appellate and Circuit Courts of Illinois who are or will be subject to mandatory retirement under Illinois law at age 70 before the end of their certified terms of office or who will be deprived of the right to run for retention of their office because they have attained or will attain the age of 70.

The voter plaintiffs Fitzpatrick, Wlliams and Lewis have been certified to represent and to bring this action on behalf of a class composed of all registered voters of the State of Illinois who are or will be denied the opportunity to vote for the judicial candidates of their choice because the judicial candidates of their choice are or will be subject to mandatory retirement under Illinois law at age 70.

The class of judge plaintiffs contend that the Act violates the equal protection clause of the Fourteenth Amendment on the following grounds:

1. There is no rational relation between age 70 and ability to discharge the duties of a judge.
2. There is no rational basis for the distinction between judges over 70, who are mandatorily retired, without a hearing as to their ability to serve, and judges under 70, who can be removed only after notice and hearing before the Illinois Courts Commission.
3. There is no rational basis for the distinction between judges, who are mandatorily retired at age 70, and other publicly-selected state officials, who are subject to no mandatory retirement age.
4. There is no rational basis for the various provisions of Section 2 of the Act which suspend the

provisions of Section 1 of the Act under the conditions, and with the effects, stated in Section 2 of the Act.

The class of voter plaintiffs contend that the Act violates their rights under the First and Fourteenth Amendments on the following grounds:

1. They are unlawfully denied the right to vote for judge candidates of their choice, insofar as they desire to vote for one or more of the members of the class of judge plaintiffs who are over age 70.
2. Their previous votes for members of the class of judge plaintiffs have been diluted insofar as members of the class of judge plaintiffs, who were previously voted for by members of the class of voters, are to be retired at age 70 prior to the expiration of the full term of the position for which members of the class of judge plaintiffs were last retained in office.

For the reasons hereinafter stated we hold that neither class of plaintiffs has shown any federal constitutional infirmity with respect to the Act.

The class of judge plaintiffs assert two additional claims which arise wholly under Illinois law, of which we have pendent jurisdiction.

The first pendent claim relates to Public Act 80-1057, enacted in 1977 by the Illinois General Assembly, which amended the Act by providing:

> "Any Supreme, Appellate or Circuit Judge who has been elected to that office and who seeks to be retained in that office under subsection (d) of Section 12 of Article VI of the Constitution shall file a declaration of candidacy to succeed himself in the office of the Secretary of State on or before the first Monday in December before the general election preceding the expiration of his term of office. The Secre-

tary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election." Ill. Rev. Stat., ch. 46, § 7A-1 (Supp. 1977).

Plaintiffs claim that Public Act 80-1057 violates Article VI, Section 12(d) of the Illinois Constitution, which provides in pertinent part:

> "Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself."

Plaintiffs' second pendent claim is that the Act violates the first sentence of Article VI, Section 15(a) of the Illinois Constitution, which provides: "The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age." Plaintiffs claim that the Act is unconstitutional under Illinois law, in that because of Section 2 and the 1977 Amendment it does not establish *a* single retirement age for Illinois judges but, rather establishes several ages.

For the reasons hereinafter stated we hold that these two contentions under Illinois law are without merit.

The action was brought on March 20, 1978. Plaintiffs promptly sought a preliminary injunction. At our suggestion the parties, through the commendable diligence

and cooperation of their counsel, readied themselves for trial on the merits which was held May 22-30. Guided by the recent decision of the Court of Appeals for this Circuit in *Gault* v. *Garrison,* 569 F.2d 993 and the Supreme Court's decision in *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, we decided the case orally on May 30, 1978. At that time we invited defendants to submit supplemental findings and conclusions, if they chose to do so, by June 7 which they did. We have now had the opportunity to consider defendants' proposed findings and conclusions and plaintiffs' objections in light of our decision of May 30, 1978. We now make our formal findings and conclusions pursuant to Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

1. Plaintiff David A. Canel is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. B; Tr. 49). Plaintiff Canel was born June 19, 1906. (Tr. 86). Plaintiff Canel was first elected a judge in 1959. (Tr. 49). Plaintiff Canel was most recently retained as a judge in the judicial retention election held in 1972. (Tr. 49). The term of the position for which plaintiff Canel was most recently retained expires on the first Monday in December, 1978. (Pl.Ex. B). Between 1959 and 1975, plaintiff Canel had not had a comprehensive physical examination. (Tr. 82). Plaintiff Canel's most recent comprehensive physical examination was in early 1976. (Tr. 81). Plaintiff Canel has never had a psychiatric or psychological examination. (Tr. 82).

2. Plaintiff Archibald J. Carey, Jr., is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. C; Tr. 103). Plaintiff Carey was born February 29, 1908. (Tr. 103). Plaintiff Carey was first elected a judge in 1966. (Tr. 103). Plaintiff Carey was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 103). The term of the position for which plaintiff Carey was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. C). Plaintiff Carey suffered a stroke on May 31, 1967, which caused him to be absent

from the bench until January 3, 1968. (Tr. 108). Plaintiff Carey has never had a comprehensive physical examination since 1976. (Tr. 118). Plaintiff Carey has never had a psychiatric or psychological examination. (Tr. 118).

3. Plaintiff Benjamin Nelson is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. F; Tr. 130). Plaintiff Nelson was born March 6, 1904. (Comp., ¶ 13(c)). Plaintiff Nelson was first elected a judge in 1960. (Tr. 130). Plaintiff Nelson was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 130). The term of the position for which plaintiff Nelson was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. F). Plaintiff Nelson most recently had a comprehensive physical examination in March of 1978. (Tr. 138). Prior to that time, the only comprehensive physical examination of plaintiff Nelson, since he has been a judge, was in 1970. (Tr. 138). Plaintiff Nelson has never had a psychiatric or psychological examination. (Tr. 139).

4. Plaintiff Raymond E. Trafelet is a Judge of the Circuit Court of Cook County, Illinois. (Pl.Ex. A; Tr. 144). Plaintiff Trafelet was born June 13, 1907. (Tr. 144-145). Plaintiff Trafelet was first elected a judge in 1968. (Tr. 144). Plaintiff Trafelet was most recently retained as a judge in the judicial retention election held in 1976. (Tr. 145). The term of the position for which plaintiff Trafelet was most recently retained expires on the first Monday in December, 1982. (Pl.Ex. A). Since he has been on the bench, plaintiff Trafelet has had physical examinations in 1969 and 1972. (Tr. 158-159). Plaintiff Trafelet has never had a psychiatric or psychological examination. (Tr. 159).

5. Each judge plaintiff is a vigorous, hardworking, productive judge.

6. Each judge plaintiff was aware of the provisions of Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977), when each last sought retention for the position each judge plaintiff now holds. (Tr. 68, 116, 137, 156).

7. Plaintiff Melvin B. Lewis, a duly registered voter, voted for plaintiff Raymond E. Trafelet for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention. He desires to vote for plaintiff Trafelet's retention in the future and for election and retention of some other judges in the class of plaintiff judges. (Comp., ¶ 14(a)).

8. Plaintiff Peter Fitzpatrick, a duly registered voter, voted for plaintiff David A. Canel for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1972 election for judicial retention. He desires to vote for plaintiff Canel's retention in the election to be held in November of 1978, and for the election and retention in future elections of other judges in the class of plaintiff judges. (Comp., ¶ 14(b)).

9. Plaintiff Albert W. Williams, a duly registered voter, voted for plaintiff Archibald J. Carey, Jr. for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention. He desires to vote for plaintiff Carey's retention in the future and for election and retention in future elections of other judges in the class of plaintiff judges. (Comp., ¶ 14(c)).

10. Defendant James R. Thompson is the Governor of the State of Illinois. (Comp., ¶6).

11. Defendant State Board of Elections of the State of Illinois was created by the General Assembly and serves, pursuant to Ill. Rev. Stat., ch. 46, § 1A-1, *et seq.*, to perform duties assigned to it by law. Defendants Michael Lavelle, as Chairman and member, and Don Adams and Franklin Lunding, Jr., as members, are presently the appointed and acting members of the State Board of Elections of the State of Illinois and are vested by law with the administration of the duties of the Board. (Comp., ¶ 7).

12. Defendant Michael J. Bakalis is Comptroller of the State of Illinois. (Comp., ¶ 8).

13. Defendant Alan J. Dixon is the Secretary of State of Illinois. (Comp., ¶ 9).

14. Defendant Roy O. Gulley is the Director of the Administrative Office of the Illinois Courts. (Comp., ¶ 10).

15. Under the terms of the Act, each named plaintiff judge will be mandatorily retired on the first Monday in December, 1978. It is conceded by all parties that the above-named state official defendants will take various actions, in accordance with the statutes and Illinois constitutional provisions governing their duties, to enforce the provisions of the Act, unless they are enjoined by order of this court.

16. Defendants John J. McDonnell, Lehman Krause, James Edward Dull and W. R. Todd and intervening defendants Allen Hartman, Brian B. Duff, David J. Shields, James A Zafiratos, Michael P. Toomin, Marvin Ruttenberg, and James J. Heyda are each candidates nominated for judicial offices in Illinois which defendants assert will become vacant in December, 1978 by reason of the Act. (Comp., ¶ 10A).

17. Under the Illinois Constitution of 1870, before 1964, a great number of judicial offices existed in Illinois below the level of the Illinois Supreme Court and the Illinois Appellate Court. Under various provisions of that Constitution, there were circuit courts, city and village courts, municipal courts, county courts, probate courts, and in Cook County, the superior court and the criminal court, as well as justices of the peace courts which were authorized pursuant to various statutes and municipal ordinances. Ill. Const. 1870, Art. VI. (Def.Ex. 2, CH3-CH7).

18. Prior to 1964, all judicial officers in Illinois were required, at the end of their elected terms, to stand for re-election. Each sitting judge was required, at the end of his elected term, either to step down, or stand for re-election in a partisan contest. Thus, the entire judiciary was the periodic subject of partisan political contest. Ill. Const. 1870, Art. VI. (Def.Ex. 2, CH3-CH7).

19. Under this Constitutional scheme, between 1870 and 1964, there was no provision for mandatory retirement of judges in Illinois. There were only two methods of removing any judge from the bench for any reason, including disability for age. The first method was pursuant to Article VI, Section 30 of the 1870 Illinois Constitution:

> "The general assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three-fourths of all the members elected, of each house." Ill. Const. 1870, Art. VI, § 30. (Def.Ex. 2, CH 6).

The second method was through an impeachment proceeding pursuant to Article V, Section 15, grounds for impeachment being limited to "any misdemeanor in office." An impeachment was required to be voted by a majority of the House of Representatives and tried before the Senate. A two-thirds vote was necessary for conviction. Ill. Const. 1870, Art. V, § 15.

20. On November 6, 1962, the People of the State of Illinois, through the Constitutional amendatory process, radically changed the structure of the Illinois judiciary and method of selection and retention of judges in Illinois. No longer were judges required to run, every four or six years, for re-election to office in a partisan political campaign. Instead, the device of initial judicial election and then retention, unique to judicial offices in Illinois, was adopted:

> "Not less than six months prior to the general election next preceding the expiration of his term of office, any judge previously elected may file in the office of the Secretary of State a declaration of candidacy to succeed himself, and the Secretary of State, not less than 61 days prior to the election shall certify such candidacy to the proper election officials. At the election the name of each judge who

has filed such a declaration shall be submitted to the voters, on a special judicial ballot without party designation, on the sole question whether he shall be retained in office for another term. The elections shall be conducted in the appropriate judicial districts, circuits, counties and units. The affirmative votes of a majority of the voters on the question shall elect him to the office for another term commencing the first Monday in December following the election. Any judge who does not file a declaration within the time herein specified, or, having filed, fails of re-election, shall vacate his office at the expiration of his term, whether or not his successor, who shall be selected for a full term pursuant to Section 10 of this Article, shall yet have qualified." Ill. Const. 1870, Art. VI, § 11, amended November 6, 1962, effective January 1, 1964. (Def.Ex. 2, CH9).

21. The purpose of the provision concerning the new procedure of judicial retention was as follows:

"1. SECURITY OF TENURE IN OFFICE ASSURING INDEPENDENCE OF JUDGES

"Judges of all courts will be nominated and elected in the first instance as under the present Constitution, but once elected, each judge will be entitled at the expiration of his term to run for retention in office solely on his own record, without opposition and without party designation. All judges in office on January 1, 1963 will have this right. Thus a judge is freed from dependence upon partisan politics. This security will be conducive to impartial and even-handed justice and will encourage able lawyers to give up their law practice to run for the bench, thereby assuring good candidates for judicial office. Moreover, the voters will have a greater voice in the selection of judges because of the requirement that they be voted on at general elections, when the largest number of people vote, rather than at special judicial elections." *Id.*, § 1. (Def.Ex. 2, CH12).

22. The amendments to the Judicial Article of the Illinois Constitution which were adopted in 1962 also provided mechanisms for removal of judges which were less cumbersome than the prior devices of impeachment or recall by the General Assembly. Section 18 of the Judicial Article approved by the voters of Illinois in 1962 provided:

"Notwithstanding the provisions of this Article relating to terms of office, the General Assembly may provide by law for the retirement of judges automatically at a prescribed age; and, subject to rules of procedure to be established by the Supreme Court and after notice and hearing, any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that court, two judges of the Appellate Court selected by that court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate.

"Any retired judge may, with his consent, be assigned by the Supreme Court to judicial service, and while so serving shall receive the compensation applicable to such service in lieu of retirement benefits, if any." *Id.*, § 18. (Def.Ex. 2, CH9-CH10).

23. The provision authorizing mandatory retirement of judges was linked to the device of judicial retention. Without mandatory retirement, it was perceived by the drafters of the 1962 amendments to the Judicial Article of the Illinois Constitution of 1870 that the result of the device of judicial retention would be a judiciary in Illinois increasingly composed of elderly judges. The purposes of authorizing mandatory retirement of Illinois judges was to reduce seniority on the bench by providing a time when judges would ultimately leave the bench and make way for others to assume the bench. (Tr. 760, 773-774).

24. The effective date of the new Judicial Article of the Illinois Constitution of 1870, which was ratified by the voters of Illinois on November 6, 1962, was January 1, 1964. (Def.Ex. 2, CH10).

25. In 1965, the Illinois General Assembly enacted "An Act relating to the compulsory retirement of judges," ("The Act"), effective July 20, 1965, which provided:

"§ 1. A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

"§ 2. The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

"Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters."

The provisions of the Act now appear in Ill. Rev. Stat., ch. 37, §§ 23.71, 23.72 (1977).

26. The only stated and recorded purpose of the Act was:

". . . to insure a more vigorous judiciary to which the public is entitled." (Def.Ex. 3, H10; Tr. 757-759).

27. The obvious purpose of the provisions of Section 2 of the Act, which suspended the effectiveness of Section 1 of the Act, was to adapt the Act to incumbent members of the Illinois judiciary who, on the effective date of the Act, had assumed the bench prior to the constitutional amendments of 1962 which authorized mandatory retirement of Illinois judges. (Ill. Const. 1870, Art. VI; Tr. 724, 730-731). Reading the Act *in pari materia* with the Illinois Pension Code as it pertained to judges in Illinois in 1965, the purpose of the first date, January 1, 1976, was to insure that judges in office on January 1, 1964 (the effective date of the 1962 Judicial Article) would earn a minimum pension based on 12 years' service. The purpose of the provision allowing for a total of 18 years of judicial service was to allow those judges to earn a maximum judicial pension. *See,* Ill. Rev. Stat., ch. 108½, § 18-124 (1977).

28. Judging is largely an intellectual function which must be performed in a fair and even-handed way. A vigorous judiciary is one with experience; one which stays abreast of changes in the law; which can listen and read attentively; assimilate complex facts; reach findings and conclusions on the basis of those facts; apply the law to those facts to arrive at judgments; be fair and open-minded, and yet decisive. A vigorous judiciary must also have the physical ability to put in a full day of judicial work. In Illinois outside of Cook County, this can require a Circuit Judge to do substantial amounts of travelling on a day-to-day basis in the discharge of the duties of his office. (Tr. 180-183; 225-229; 267-269; 325-335; 777-779; Def.Ex. 5).

29. There is substantial agreement among experts in psychology, based upon scientific research which has been published on a continuing basis since the 1940's, that the following phenomena with respect to human intellectual function are observed to be associated with age:

a. Language skills and the accumulation of concrete knowledge tend to increase through the fifth

decade of life, for active, intelligent, competent working people, after which time these functions tend to reach a plateau and tend not to decrease until just prior to death.

b. Two core abilities of human intellectual function, intellectual speed and intellectual flexibility, tend to decrease or slow down after the fourth decade of life, with the decline in these core abilities becoming increasingly rapid after the sixth decade of life.

c. The efficiency of the retrieval of information from memory, particularly the retrieval of relatively new information, tends to show a significant decrement in the sixth and seventh decades of life.

(Tr. 843-845; 853-919; 975-977). The terms "after the sixth decade of life" and "between the sixth and seventh decades of life" refer to the ages of 65 to 75. (Tr. 846).

30. There is substantial agreement among experts in psychology, based upon scientific research which has been published on a continuing basis since the 1940's, that in the period of human life beyond the sixth decade, the ability to attend to complex conceptual and factual matters, and the ability to draw fine distinctions, tend to deteriorate due to increasing distractability, decreasing ability to focus attention, increasing difficulty in dealing with unfamiliar information, and increasing difficulty in processing information rapidly. (Tr. 845; 853-919).

31. There is sharp debate among experts in psychology as to whether these phenomena which have been observed to be associated with age are caused by age alone, or by some other combination of factors. (Tr. 846-847; 978). There is, however, relatively little debate among experts in psychology with respect to the truth and validity of the observations stated in paragraphs 29 and 30, above, and the fact of the association of these phenomena with age. (Tr. 846-847; 978).

32. The observations described in paragraphs 29 and 30 above, are highly relevant to the judicial function and a vigorous judiciary, since they involve the essences of the decisional processes of a judge. (Tr. 180-183; 225-229; 267-269; 823-830).

33. A study published in 1964 by plaintiffs' expert Dr. Neugarten, which culminated ten years of research, showed a deterioration of seven personality factors when subjects in the age group of 63 to 71 were compared with subjects in the age group of 50 to 58. A comparison of those groups showed that the older group was more dogmatic, relied to a greater extent upon unsupported views, tended to express themselves more idiomatically, was less concerned with causality, was more self-indulgent, was more concerned with and oriented to the past than the future, and was less concerned with learning. (Tr. 443-460). These personality factors are critical to the judicial function and a vigorous judiciary, since the deterioration noted would adversely affect qualities of personality essential to fair and even-handed discharge of the judicial function. (Tr. 180-183; 225-229; 267-269; 443-460).

34. During the course of its deliberations in 1963 and 1965 on the subject of a mandatory retirement age for Illinois judges, the Illinois General Assembly considered alternatives between the ages of 65 and 75. At that time, age 65 was the usual age for retirement for most vocations. The age of 70 was chosen for the retirement of Illinois judges for two reasons: first, judging is more an intellectual than a physical endeavor, and second, to secure the benefits to the State of Illinois of an additional five years' experience and service from its judges. (Tr. 726-728; 753-755).

35. The Sixth Illinois Constitutional Convention, in 1970, was aware of the existence of the Act, and thereafter proposed for adoption, among other provisions, sections 15(a) of Article VI of the Illinois Constitution of 1970, which provides in part that: "The General

Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age." That provision was ratified with the Illinois Constitution of 1970. (Def.Ex. 4, p. 2; Ill. Const. 1970, Art. IV, § 15(a)).

36. In 1973, the Illinois General Assembly enacted the following addition as an amendment to the Act:

> "The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term."

(Def.Ex. 3, H38-H56). That provision is now codified in Ill. Rev. Stat., ch. 37, § 23.72 (1977). The purpose of that provision was to allow certain Illinois judges to qualify for a minimum pension. (Tr. 733-736).

37. Of the various provisions in section 2 of the Act, which suspend the provisions of section 1 of the Act, the only provision which continues to have any effect is the provision which permits a judge in office on July 20, 1965, to continue to service until ". . . the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act." After December, 1978, that provision will apply to three Illinois judges. (Tr. 321-322).

38. The Illinois Constitution of 1970 carried forward the device of judicial retention, which is still unique to judges in Illinois. (Ill. Const. 1970, Art. VI, § 12(d)).

39. Illinois judges are, and since 1964 have been, unique among publicly-selected officials of state government in Illinois by virtue of the nature of their duties, and their tenure in office afforded by the device of judicial retention. (Ill. Const. 1870, Art. IV, V, VI; Ill. Const. 1970, Art. IV, V, VI).

40. No other publicly-selected officials of state government in Illinois are subject to a mandatory retirement age. *See,* Ill. Rev. Stat., ch. 46, § 25-2 (1977).

41. Between January 1, 1964 and July 1, 1971, Illinois judges not mandatorily retired in accordance with the Act were subject to the following provision of the Illinois Constitution:

> ". . . [S]ubject to rules of procedure to be established by the Supreme Court and after notice and hearing, any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that court, two judges of the Appellate Court selected by that court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate." Ill. Const. 1870, Art. VI, § 18, amended November 6, 1962, effective January 1, 1964.

42. Since July 1, 1971, Illinois judges not mandatorily retired in accordance with the Act have been subject to the following provisions of the Illinois Constitution:

> "(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of the Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.
>
> "(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate

Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

"(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

"(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

"(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

"(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission." Ill. Const. 1970, Art. VI, § 15(b)-(g).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action. 28 U.S.C. §§ 1331, 1343(3), 1343(4), 42 U.S.C. § 1983. This is an appropriate action for declaratory relief. 29 U.S.C. §§ 2201, 2202. This Court has pendent jurisdiction of the claims presented under Illinois law. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

2. The class of plaintiff Illinois judges hold office by virtue of a privilege granted by the State of Illinois. *Napolitano* v. *Ward,* 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied,* 409 U.S. 1037, *reh. denied,* 410 U.S. 947 (1973).

3. The class of plaintiff Illinois judges have no fundamental right to government employment. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976).

4. Age does not constitute a suspect class for purposes of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Murgia, supra,* at 313-314; *Gault* v. *Garrison,* 569 F.2d 993 (7th Cir. 1978).

5. Whether the Act violates the rights of the class of plaintiff Illinois judges under the equal protection clause of the Fourteenth Amendment to the United States Constitution by mandating retirement of Illinois judges at age 70 is to be determined by whether the retirement of judges at age 70 is rationally related to the objective of the Act, ". . . to insure a more vigorous judiciary to which

the public is entitled," and whether the Act rationally furthers that purpose. *Murgia, supra,* at 314; *Gault, supra,* at 995.

6. The Act is presumed to be valid. *Murgia, supra,* at 314.

7. *Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 78-79 (1911), sets forth the following rules which govern the assessment of the constitutionality of the Act:

> "1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Murgia, supra, at 314 n.5; *Gault supra,* at 995.

8. Scientific observations since the 1940's have shown an association between age and decline in human intellectual function and personality factors during the sixth and seventh decades of life, between the ages of 65 and 75. These scientific observations had been published as of the time the Illinois General Assembly considered and enacted the Act. There was at that time, and continues to be, substantial scientific agreement about the fact of the associations which have been observed. These scientific observations sustain the retirement age of 70 for Illinois judges mandated by the Act. *Murgia, supra.*

9. The equal protection clause of the Fourteenth Amendment to the United States Constitution does not require that the Illinois General Assembly have probed the scientific cause of the observed association between age and decline in human intellectual function and personality factors. *Lindsley, supra; Murgia, supra.*

10. There is debate, since the enactment of the Act, among scientists as to the cause of the observed associations between entry into the sixth and seventh decades of life and the noted decline in human intellectual function and personality factors. The fact of such debate is insufficient basis to invalidate the Act. *United States* v. *Thorne,* 325 A.2d 764, 768 (D.C.App. 1974); *United States* v. *Brookins,* 383 F. Supp. 1212 (D.N.J. 1974).

11. The question raised by this action is not whether the Act precisely filters out those, and only those, who are in the factual position which generated the concern reflected in the Act. Nor is the question whether the Act filters out a substantial part of the class which caused the concern of the Illinois General Assembly or whether it filters out more members of the class than non-members. The question is whether the Illinois General Assembly, its concern having been reasonably aroused by the possibility of the problem of a non-vigorous judiciary which it legitimately sought to avoid, could have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. *Weinberger* v. *Salfi,* 422 U.S. 749, 776-777 (1975); *Murgia, supra,* at 316.

12. Retirement of Illinois judges at age 70 pursuant to the Act is rationally related to the objective of the Act, ". . . to insure a more vigorous judiciary to which the public is entitled," and rationally furthers that purpose. *Murgia, supra,* at 314-317; *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir. 1975), *cert. denied,* 423 U.S. 891 (1975); *McIlvaine* v. *Pennsylvania State Police,* 309 A.2d 801

(Pa. 1973), *appeal dismissed for want of substantial federal question,* 415 U.S. 986 (1974); *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D.D.C. 1974), *aff'd summarily,* 420 U.S. 940 (1975); *Cannon* v. *Guste,* 423 U.S. 918 (1975), *aff'g* No. 74-3211 (May 6, 1975, E.D.La.); *Johnson* v. *Lefkowitz,* 566 F.2d 866 (2d Cir. 1977); *Talbot* v. *Pyke,* 533 F.2d 331 (6th Cir. 1976); *Klain* v. *Pennsylvania State University,* 434 F. Supp. 571 (M.D. Pa. 1977); *Weiss* v. *Walsh,* 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd without opinion,* 461 F.2d 846 (2d Cir. 1972), *cert. denied,* 409 U.S. 1129 (1973); *Palmer* v. *Ticcione,* 433 F. Supp. 653 (E.D. N.Y. 1977); *Armstrong* v. *Howell,* 371 F. Supp. 48 (D. Neb. 1974); *Aronstam* v. *Cashman,* 325 A.2d 361 (Vt. 1974); *Nelson* v. *Miller,* 480 P.2d 467 (Utah 1971).

13. The class of plaintiff judges have taken office for terms clearly established by the Illinois General Assembly and they are properly subject to the conditions imposed by the state upon the length of their terms. *Rubino* v. *Ghezzi,* 512 F.2d 431, 433 (2d Cir. 1975); *Gordon* v. *Leatherman,* 450 F.2d 562, 565 (5th Cir. 1971).

14. Since Illinois judges hold an office unique among publicly-selected officials of state government in Illinois, the State of Illinois may permissibly provide for mandatory retirement of judges while not so providing for other publicly-selected officials of state government. *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940); *Martin-Trigona* v. *Underwood,* 529 F.2d 33 (7th Cir. 1975); *Lefkovits* v. *State Board of Elections,* 400 F. Supp. 1005 (N.D. Ill. 1975), *aff'd summarily,* 424 U.S. 901 (1975).

15. That the State of Illinois affords judges not mandatorily retired a hearing before the Illinois Courts Commission prior to removal does not deny the class of plaintiff judges equal protection of the laws. *Cannon* v. *Guste,* 423 U.S. 918 (1975), *aff'g* No. 74-3211 (May 6, 1975, E.D. La.). *See, Id.,* Jurisdictional Statement, and Motion to Affirm. *See also, Hicks* v. *Miranda,* 422 U.S. 332 (1975); *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246 (1959).

16. None of the provisions of Section 2 of the Act or the amendment of 1977 deny the class of plaintiff judges equal protection of the laws, since the State of Illinois may reasonably adapt mandatory judicial retirement to a situation where some judges who had been elected prior to any provision for mandatory retirement had substantial interests in completing their terms of office and securing their judicial pensions. *City of New Orleans* v. *Dukes,* 427 U.S. 297, 305 (1976); *Sperry and Hutchinson Co.* v. *Rhodes,* 220 U.S. 502, 505 (1910); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1934); *Watson* v. *Maryland,* 218 U.S. 173 (1910); *Dent* v. *West Virginia,* 129 U.S. 114 (1889); *Stephens* v. *Dennis,* 293 F. Supp. 589 (N.D. Ala. 1968); *Wasmuth* v. *Allen,* 252 N.Y.S.2d 65 (1964); *Brooks* v. *State Board of Funeral Directors and Embalmers,* 195 A.2d 728, 738 (Md. 1963); *Beeman* v. *Michigan Board of Pharmacy,* 35 N.W.2d 354 (Mich. 1949); *Rosenblatt* v. *California State Board of Medical Examiners,* 140 P.2d 1089 (Cal. 1914).

17. The rights of the class of plaintiff voters do not exceed the rights of the class of plaintiff judges. Since the class of plaintiff judges are lawfully subject to the terms of the Act, no rights of the class of plaintiff voters are impaired. *Manson* v. *Edwards,* 482 F.2d 1076, 1078 (6th Cir. 1973); *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir. 1975), *cert. denied,* 423 U.S. 89 (1975); *Blassman* v. *Markworth,* 359 F. Supp. 1 (N.D. Ill. 1973).

18. Since the framers of the Illinois Constitution of 1970 were aware of the provisions of the Act, and since it is not inconsistent with Article VI, section 15(a) of the Illinois Constitution of 1970, the Act does not violate that constitutional provision by failing to prescribe *a* retirement age. Furthermore, once the pension formula exceptions have run their course the Act will prescribe *a* retirement age. Smith-Hurd Ill. Anno. St., Commentary to Art. VI, § 15(a), Ill. Const. 1970; Ill. Const. 1970, Transition Schedule, § 9; *City of Chicago* v. *Pollution Control Board,* 59 Ill.2d 484, 322 N.E.2d 11 (1975).

19. Public Act 80-1057 does not violate Article VI, section 12(d) of the Illinois Constitution of 1970. Public Act 80-1057 does not prescribe a time within which a judge seeking retention must file a declaration of candidacy to succeed himself which is "less than six months before the general election preceding the expiration of his term of office . . ." § 12(d). Indeed, the Act requires filing well before the constitutional six-month deadline. The purpose of this advancement of the filing deadline was to enable the electorate at the ensuing primary and general elections to fill judicial vacancies occasioned by judges who decided not to seek retention.

FINAL JUDGMENT

Accordingly, on the basis of the foregoing Findings of Fact and Conclusions of Law, judgment is hereby entered for the defendants and against the plaintiffs as to all issues raised by Counts I, II, and III of the Second Amended Complaint, all parties to bear their own costs and attorneys' fees.

ENTER: /s/ Prentice H. Marshall, Judge
Prentice H. Marshall, Judge

Dated: July 11, 1978

ILLINOIS STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 37, Ill. Rev. Stats. (1977) §§ 23.71, 23.72; Laws 1965, p. 1792, § 1 and § 2 eff. July 20, 1965, as amended by Public Act 78-805, § 1, effective September 12, 1973.

§ 23.71 Automatic retirement — Conclusion of pending matters

A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Laws 1965, p. 1792, § 1, eff. July 20, 1965.

§ 23.72 Continuance in office — Conditions — Date of retirement

The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Laws 1965, p. 1792, § 2, eff. July 20, 1965.

§ 23.72 Continuance in office — Conditions — Date of retirement

The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.

The provisions of Section 1 of this Act are aso suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.

Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

Amended by P.A. 78-805, § 1, eff. Sept. 12, 1973

CONSTITUTION OF ILLINOIS 1970 ARTICLE VI
(Emphasis supplied.)

• • •

§ 10. *Terms of Office*

The terms of office of Supreme and Appellate Court Judges shall be ten years; of Circuit Judges, six years. . .

§ 11. *Eligibility for Office*

No person shall be eligible to be a Judge or Associate Judge unless he is a United States citizen, a licensed at-

torney-at-law of this State, and a resident of the unit which selects him. No change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change.

§ 12. *Election and Retention*

(a) Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

(b) The office of a Judge shall be vacant upon his death, resignation, retirement, removal, or upon the conclusion of his term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 64 days before the election,

shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

(e) A law reducing the number of Appellate or Circuit Judges shall be without prejudice to the right of the Judges affected to seek retention in office. A reduction shall become effective when a vacancy occurs in the affected unit.

• • •

§15(a) *The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age.* • • •

(b) *A Judicial Inquiry Board is created.* The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with *willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties.* All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) *to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physicially or mentally unable to perform his duties.*

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission.

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

No. 78 C 1036

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and MICHAEL LAVELLE, as Chairman and Member, and DON ADAMS, and FRANKLIN LUNDING, JR., as Members of the State Board of Elections of the State of Illinois; and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD,

Defendants,

and

ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN M. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Intervenor Defendants.

SECOND AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiffs by their attorney complain against Defendants as follows:

COUNT I

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Sections 1343(3), 1343(4), 1331, 2201 and 2202. This is a civil action authorized by Title 42 U.S.C. Section 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. This proceeding is for a declaratory judgment that certain acts and practices of Defendants violate the aforementioned rights secured by the Constitution of the United States. This action also seeks injunctive and other equitable relief against the acts and practices complained of herein, and declaratory relief. The matters in controversy exceed the value of $10,000 exclusive of interest and costs and arise under the Constitution of the United States.

Parties

1A. Plaintiff BENJAMIN NELSON is a Judge of the Circuit Court of Cook County, Illinois, and holds said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on December 6, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated as Exhibit F. He is a citizen of the United States and a resident of the Northern District of Illinois.

2. Plaintiff RAYMOND E. TRAFELET is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on

November 30, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit A. He is a citizen of the United States and a resident of the Northern District of Illinois.

3. Plaintiff DAVID A. CANEL is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on November 30, 1972, which certified his right to hold said office until the first Monday in December of 1978, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit B. He is a citizen of the United States and a resident of the Northern District of Illinois.

4. Plaintiff ARCHIBALD J. CAREY, JR. is a Judge of the Circuit Court of Cook County, Illinois, and holds his said office by reason of election and pursuant to Certificate of Election issued by the then Governor of Illinois on November 30, 1976, which certified his right to hold said office until the first Monday in December of 1982, a true copy of which Certificate is attached hereto and incorporated herein as Exhibit C. He is a citizen of the United States and a resident of the Northern District of Illinois.

5.(a) Plaintiff PETER FITZPATRICK is a duly registered voter who resides in Cook County, Illinois. He is an attorney admitted to practice in Illinois. He is a citizen of the United States and a resident of the Northern District of Illinois.

(b) Plaintiff ALBERT W. WILLIAMS is a duly registered voter who resides in Cook County, Illinois. He was Chairman of the Board, No. Carolina Mutual Life Ins. Co. He is a citizen of the United States and a resident of the Northern District of Illinois.

(c) Plaintiff, MELVIN B. LEWIS, is a duly registered voter who resides in Cook County, Illinois. He is Professor of Law at John Marshall Law School. He is a

citizen of the United States and a resident of the Northern District of Illinois.

6. JAMES R. THOMPSON ("THOMPSON") is the Governor of Illinois.

7. Defendant STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS ("BOARD") was created by the General Assembly and serves pursuant to Ill. Rev. Stats., Ch. 46, §1A-1, *et seq.*, to perform duties assigned to it by law. Defendants MICHAEL LAVELLE, as Chairman, and member, and DON ADAMS, and FRANKLIN LUNDING, JR., as members, are presently the appointed and acting members of the STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS (hereinafter collectively "BOARD MEMBERS") and are vested by law with the administration of the duties of the BOARD.

8. Defendant MICHAEL J. BAKALIS is Comptroller of the State of Illinois.

9. Defendant ALAN J. DIXON is the Secretary of State of Illinois.

10. Defendant ROY O. GULLEY is the Director of the Administrative Office of the Illinois Courts.

10A. Defendants JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL and W. R. TODD and Intervening Defendants ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A ZAFIRATOS, ANTHONY J. BOSCO, MELVIN M. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA are each candidates nominated for judicial offices in Illinois which defendants assert will become vacant in December of 1978 by reason of the mandatory retirement provisions pertaining to Illinois judges, which are complained of herein, to wit:

Candidate Defendants	Judge For Whose Purported Vacancy They Are Candidates	Pertinent Court
Allen Hartman Brian Duff	Justice Mayer Goldberg	Appellate Court, First District
David Shields	Judge David A. Canel	Circuit, Cook County
James Zafiratos Michael Toomin	Judge Archibald J. Carey	Circuit, Cook County
Anthony J. Bosco Melvin A. Landau	Judge Raymond Drymalski	Circuit, Cook County
John J. McDonnell	Judge Benjamin Nelson	Circuit, Cook County
Marvin H. Ruttenberg James J. Heyda	Judge Raymond A. Trafelet	Circuit, Cook County
Lehman Krause James E. Dull	Judge Alvin L. Williams	2d Circuit, Jefferson County
W. R. Todd	Judge E. Harold Wineland	11th Circuit, Clay County

Each said defendant and intervening defendant claims or may claim an interest in this proceeding, though plaintiffs aver that said defendants have no rights in the premises.

Class Action

11.(a) Plaintiffs Trafelet, Canel, Nelson and Carey, bring this action on their behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other Judges of the Circuit Court of Cook County and all other counties of the State of Illinois who are, or will be, subject to mandatory retirement under Illinois law at the age of 70 before the end of their certified terms of office or who will be denied the right to run for retention of their said office because they have attained or will attain the age of 70. The persons in the class referred to are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class: the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the Defendants have acted and will act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. Moreover, the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant parties opposing the class.

(b) Plaintiffs Peter Fitzpatrick, Albert W. Williams, and Melvin B. Lewis bring this action on their behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other registered voters of Cook County and all other counties of the State of Illinois who are, or will be denied the opportunity to vote for the judicial candidates of their choice because the judicial candidates of their choice are, or will be, subject to mandatory retirement under Illinois law at the age of 70. The persons in the class referred to are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of

the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the Defendants have acted and will act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. Moreover, the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant parties opposing the class.

Facts

12.(a) Plaintiffs Trafelet, Nelson and Carey are willing, qualified, desirous, and fully able in all respects to continue to serve as Judges of the Circuit Court to the end of their elected terms in 1982. Plaintiff Canel is willing, desirous, qualified and fully able in all respects to serve as a Judge of the Circuit Court beyond the end of his current term in 1978, and he has filed with the Illinois Secretary of State DIXON his declaration of candidacy to succeed himself in retention election to be held in November of 1978, all pursuant to Article 6, ¶12(d) of the Illinois Constitution of 1970, a true copy of which declaration of candidacy is attached hereto and incorporated herein as Exhibit D.

(b) As shown hereinbelow, were it not for the mandatory retirement requirements under Illinois law of which complaint is made herein, Plaintiffs Trafelet, Nelson and Carey would be entitled to serve as judges to the end of their respective terms in 1982, and Plaintiff Canel would be entitled to stand for election in 1978 on the retention ballot for Judges of the Circuit Court of Cook County, but each Judge Plaintiff is barred by such mandatory retirement from doing so entirely because of their respective ages.

13.(a) Plaintiff Canel was born June 19, 1906, and attained his 70th birthday on June 19, 1976. He was first

elected as a Judge of the Circuit Court of Cook County in 1959, and was retained by retention elections for judges in 1966 and 1972, certified as aforesaid.

(b) Plaintiff Trafelet was born June 13, 1907, and attained his 70th birthday on June 13, 1977. He was first elected as a Judge of the Circuit Court of Cook County in 1968, and was retained by retention elections for judges in 1970 and 1976, certified as aforesaid.

(c) Plaintiff Nelson was born March 6, 1904, and attained his 70th birthday on March 6, 1974. He was first elected as a Judge of the Municipal Court of Chicago in 1960 and thereafter by law became a judge of the Circuit Court of Cook County, and was retained by retention elections for judges in 1964, 1970, and 1976, last certified as aforesaid.

(d) Plaintiff Carey was born February 29, 1908, and attained his 70th birthday on March 1, 1978. He was first elected as a Judge of the Circuit Court of Cook County in 1966, and was retained by retention elections for judges in 1970 and 1976, certified as aforesaid.

14.(a) MELVIN B. LEWIS, as a duly registered voter, voted for Plaintiff Raymond E. Trafelet for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention, and he wants to vote for Trafelet's retention in the future and for election and retention of some other Judges in the Judges class. But his said vote in 1976 has been nullified and he is denied the right to vote for the judicial candidate of his choice because of the mandatory retirement provision in the Illinois law which requires judges to retire at the age of 70.

(b) PETER FITZPATRICK, as a duly registered voter, voted for Plaintiff David A. Canel for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1972 election for judicial retention and he wants to vote for Canel's retention in the election to be held in November of 1978, and for election and retention in future

elections of other Judges in the Judges class. But he is denied the right to vote for the judicial candidate of his choice because of the mandatory retirement provision in the Illinois law which requires judges to retire at the age of 70.

(c) ALBERT W. WILLIAMS, as a duly registered voter, voted for Plaintiff Archibald J. Carey, Jr. for the office of Judge of the Circuit Court of Cook County, Illinois, in the 1976 election for judicial retention and he wants to vote for Carey's retention in the future and for election and retention in future elections of other judges in the Judges class. But his said vote in 1976 has been nullified and he is denied the right to vote for the judicial candidate of his choice in the future because of the mandatory retirement provision in the Illinois law which requires judges to reire at the age of 70.

15. The Constitution of Illinois (1970), Article 6, provides in pertinent part as to Judges and election or retention of Circuit Judges in Illinois and the duties of the Secretary of State pertaining to retention of judges:

§ 10. Terms of Office

The terms of office of Supreme and Appellate Court Judges shall be ten years; of Circuit Judges, six years. . . .

§ 11. Eligibility for Office

No person shall be eligible to be a Judge or Associate Judge unless he is a United States citizen, a licensed attorney-at-law of this State, and a resident of the unit which selects him. No change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change.

§ 12. Election and Retention

(a) Supreme, Appellate and Circuit Judges shall be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law. A

person eligible for the office of Judge may cause his name to appear on the ballot as a candidate for Judge at the primary and at the general or judicial elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions.

(b) The office of a Judge shall be vacant upon his death, resignation, retirement, removal, or upon the conclusion of his term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and

Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

(e) A law reducing the number of Appellate or Circuit Judges shall be without prejudice to the right of the Judges affected to seek retention in office. A reduction shall become effective when a vacancy occurs in the affected unit.

16. Pursuant to the foregoing provisions, the Illinois Legislature has provided for the election and retention of Circuit and other Judges of Illinois in The Election Code, Ch. 46, Ill. Rev. Stats. §1-1 et seq., and other statutes pursuant to which Defendants have *inter alia* the following duties applicable herein:

(a) The defendant Board and its members, upon receipt from county and local election authorities of the official canvassas of elections for judges, is to certify and transmit to the defendant State Controller a list of persons elected to judicial vacancies, or retained in office. Also, the Defendant Board transmit to the Supreme Court the names of persons elected to judgeships in adversary elections and the names of judges who win or fail to win retention in office. In addition, the Defendant Board causes to be placed on the retention ballot the names of judges seeking retention.

(b) Upon receipt of certificate from the Defendant Board, the State Controller is to include all certified persons for payments by the State for judicial duties, and thereupon exclude from such payments all persons formerly Judges whose positions became vacant, or were not retained.

(c) The defendant Governor is to issue certificates of election to persons newly elected as judges to fill the vacancies existing in judicial offices, or who were retained in office.

(d) Defendant Gulley causes Judges to be barred from and taken off the State Judicial Payroll pursuant to the mandatory retirement act, and he causes other persons elected to the supposed vacancies of the mandatorily retired judges to be added to that payroll.

(e) The defendant Secretary of State is to accept declarations of candidacy for judges seeking retention and certify same to the proper local election officials and the defendant Board and its members. However, pursuant to Public Act 80-1057 enacted over veto effective November 23, 1977, Ch. 46, Ill. Rev. Stats. §7A-1, the Illinois Legislature has further provided, contrary to the Article 6, §12(d) of the Illinois Constitution, that:

> "Any Supreme, Appellate or Circuit Judge who has been elected to that office and who seeks to be retained in that office under subsection (d) of Section 12 of Article VI of the Constitution shall file a declaration of candidacy to succeed himself in the office of the Secretary of State *on or before the first Monday in December before the general election preceding the expiration of his term of office.* The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election." (Emphasis added.)

Therefore, pursuant to Public Act 80-1057, the defendant Secretary of State will not accept any such declarations for the 1978 retention election filed after the first Monday in December of 1977, rather than accepting such filings up to six months prior to the 1978 election as permitted by the Illinois Constitution.

17. The Constitution of Illinois (1970) further provides in Article 6 in pertinent part that

> "§15(a) The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. • • •"

Pursuant to that provision, and prior authority the Illinois General Assembly adopted the following provisions in 1965 and 1973, Chapter 37, Ill. Rev. Stat. §§ 23.71, 23.72, pursuant to which Plaintiff Judges will lose their offices on December 4, 1978 and thereafter be disqualified from election or retention:

> § 23.71 Automatic retirement - Conclusion of pending matters
>
> A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the dispositions of such matters.
>
> Laws 1965, p. 1792, § 1, eff. July 20, 1965.
>
> § 23.72 Continuance in office — Conditions — Date of retirement
>
> The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including

> all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.
>
> Laws 1965, p. 1792, § 2, eff. July 20, 1965.
>
> § 23.72 Continuance in office—Conditions—Date of retirement
>
> The provisions of Section 1 of this Act are suspended, however, with respect to any judge in office on the effective date of this Act. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70.
>
> The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code, on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending

before him unless the Supreme Court makes other provisions for the disposition of such matters. Amended by P.A. 78-805, § 1, eff. Sept. 12, 1973.

18(a). The Constitution of Illinois (1970) further provides as to discipline and removal of judges, Article 6, §15:

(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with *willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties.* All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem

compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) *to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or* (2) *to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.*

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission.

(Emphasis supplied.)

(b). Pursuant to the foregoing Constitutional provisions, the Illinois Supreme Court has appointed a Judicial Inquiry Board and Courts Commission. Further, that Court established Standards of Judicial Conduct and other requirements, and has authorized discipline of Judges by the Courts Commission established by the Constitution for breach of those standards and requirements. Ch. 110A, Ill. Rev. Stats. §61 through §71 (Illinois Supreme Court Rules, §61 through §71).

19. No other elected official in Illinois is forced to retire or is disqualified from holding his elected office by reason of attaining a maximum age. All other elected officials in Illinois become disqualified from holding elected office pursuant to Chapter 46, Ill. Rev. Stats. §25-2, *Events on which elective office become vacant,* which provides:

> "Every elective office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:
>
> First — The death of the incumbent.
>
> Second — His resignation.
>
> Third — His becoming insane.
>
> Fourth — His ceasing to be an inhabitant of the State; or if the office is local, his ceasing to be an inhabitant of the district, county, town, or precinct for which he was elected; Provided, that the provisions of this paragraph shall not apply to township officers whose township boundaries are changed in accordance with section 3a of Article III of 'An Act to revise the law in relation to township organization', approved March 4, 1874, as amended.
>
> Fifth — His conviction of an infamous crime, or of any offense involving a violation of official oath.
>
> Sixth — His removal from office.
>
> Seventh — His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law.
>
> Eighth — The decision of a competent tribunal declaring his election void.
>
> No elective office, except as herein otherwise provided, shall become vacant until the successor of the incumbent of such office has been appointed or elected, as the case may be, and qualified." 1943, May 11, Laws 1943, Vol. 2, p. 1, §25-2.

20. Pursuant to the foregoing Constitutional provisions, statutes, and rules of the Illinois Supreme Court, were it not for the statutes mandating retirement and disqualification of judges who have attained the age of 70,

(a) Plaintiffs Trafelet, Nelson and Carey, having been duly retained and certified by Certificates of Election to serve until 1982, are entitled to serve until the expiration of their terms and thereafter seek retention in office, subject only to possible removal or discipline by the Courts Commission for reasons set forth in the Constitution and Illinois Supreme Court Rules and subject to the procedural rights afforded them under the Illinois and United States Constitutions and granted by the Inquiry Board and Commission.

(b) Plaintiff Canel, having been previously elected as a Judge of the Circuit Court to serve until 1978, is entitled, subject only to possible removal or discipline by the Courts Commission for reasons set forth in the Constitution and Illinois Supreme Court Rules and subject to the procedural rights afforded him under the Illinois and United States Constitutions and granted by the Inquiry Board and Commission, to declare his candidacy for retention in the election to be held in November of 1978, and have his candidacy for such retention certified by the Illinois Secretary of State to the proper election officials not less than 63 days before the election, to wit, no later than September 5, 1978.

21. Pursuant to the foregoing Constitutional provisions, statutes, and rules of the Illinois Supreme Court, were it not for the statutes mandating retirement and disqualification of judges who have attained the age of 70:

(a) Plaintiffs Lewis and Williams, being duly registered voters, would be able to vote for the judicial candidates of their choice, Trafelet and Carey respectively, for retention in the future, and for retention and election

of other members of the Judges class, and would not have their prior votes for Trafelet and Carey respectively diluted and nullified.

(b) Plaintiff Fitzpatrick, being a duly registered voter, would be able to vote for the judicial candidate of his choice, Canel, for retention in the November, 1978 election, and for retention and election of other members of the Judges class in that and future elections.

22. The Defendants hereto, and each of them, have, however, complied with, enforced, and have demonstrated their respective intent in the future unless restrained by this Court to comply with and enforce the mandatory requirement provisions as aforesaid pertaining to Judges, to wit Ch. 37, Ill. Rev. Stats. §§ 23.71, 23.72, so as to prevent Plaintiffs Trafelet and Carey and other judges similarly situated from holding their judicial offices until the completion of their respective terms, and so as to prevent Plaintiff Canel and others similarly situated from filing for retention, in the following particulars, to wit:

(a)(i) Defendant Dixon as Secretary of State has refused and will continue to refuse to certify to the State Board of Elections and other appropriate election officials no later than September 5, 1976, for inclusion on retention ballots Plaintiff Canel and all other judges similarly situated who have attained the age of 70 years, and therefore Canel and the others similarly situated will not appear on the retention ballot for Judges in the elections to be held in November of 1978, and subsequently.

(ii) Because of Public Act 80-1057, enacted as aforesaid effective November 23, 1977, the Defendant Secretary was not required to accept after the first Monday in December, 1977, declarations of candidacy from judges who desire to seek retention in the 1978 election and who may be members of the Plaintiff Judges' class entitled to benefit hereby but who believed their retirement was mandated

by the provisions complained of herein and who have therefore not heretofore filed for retention. The foregoing is so despite the Illinois Constitution which would permit such filings with the Defendant Secretary of State through May 7, 1978. One member of the Judges' class who was thereby affected was Judge E. Harold Wineland, who filed his declaration of candidacy in April, 1978, after learning of the pendency of this case, a true copy of which declaration is attached as Exhibit G.

(b) The State Board of Elections and its Chairman and Members have recognized and declared that the offices of Plaintiffs Trafelet, Canel, Nelson and Carey and all Judges similarly situated are and were vacant, and have certified that other persons currently are running for the supposed vacancies of the offices of these Judge Plaintiffs and such other judges, as is more fully shown by the List of Candidates published by those defendants for the state-wide primary election to be held March 21, 1978, a true copy of the pertinent portions of which applicable to judicial elections (pp. 78-79) is attached hereto and incorporated herein as Exhibit E. Accordingly, those defendants have in the past and will in the future, unless restrained by this Court, certify to the Governor and to the State Comptroller the election of persons other than these Judge Plaintiffs and other Judges similarly situated, to the supposed vacancies existing only by reason of the aforesaid mandatory retirement provisions of Illinois law. Also pursuant to the Secretary of State's refusal to certify Plaintiff Canel and all judges similarly situated to the State Board of Election and other appropriate election officials, the Defendant State Board, which sets up the retention ballots, has refused in the past and will refuse in the future, unless restrained by this Court, to put on the retention ballots the name of Judge Canel and all judges similarly situated

by reason of the aforesaid mandatory retirement provisions of Illinois law.

(c) The Governor of Illinois has in the past, and will continue to in the future, unless restrained by this Court, upon receipt of certificates from the State Board of Elections and its members of the election of new persons to supposed judicial vacancies created as aforesaid by mandatory retirement, issued and will continue to issue certificates of election to the persons supposedly elected to such vacancies.

(d) The Comptroller of Illinois has in the past, and will continue to in the future unless restrained by this Court, upon receipt of certificates and receipt of a list of persons from the State Board of Elections and its members of the election of new persons to supposed judicial vacancies created as aforesaid by mandatory retirement, provided for payment of salaries of such new persons and he has terminated and will continue to terminate plaintiff Judges and others similarly situated from receiving their salaries as Judges.

(e) Defendant Gulley has in the past removed and will continue in the future to remove from the Judicial payroll pursuant to the aforesaid mandatory retirement provision Plaintiffs Trafelet, Canel, Nelson and Carey and all judges similarly situated unless restrained by this Court. Further, Defendant Gulley has in the past and will continue in the future, unless restrained by this Court, to add to that payroll other persons elected to the supposed vacancies of the mandatorily retired judges.

23. Because Plaintiffs Trafelet and Carey were each first elected to the bench after July 20, 1965, neither of these Judge Plaintiffs is protected by the so-called "grandfather clauses" enacted as part of the mandatory retirement act, Ch. 37, Ill. Rev. Stats. §23.72(1)(2)(3). These Judge Plaintiffs are thus treated differently than judges

holding office prior to that date who are entitled to a minimum of 18 years of judicial service before retirement under §23.72(2), even if such 18 years extends beyond the age of 70. Plaintiffs Trafelet and Carey will, if permitted to complete 18 years of judicial service, be able to serve as follows:

(a) Plaintiff Trafelet, until 1986

(b) Plaintiff Carey, until 1984.

24. Each Judge Plaintiff has fulfilled the minimum eligibility requirements under the Judges Retirement System of Illinois, (Article 18 of the Illinois Pension Code, Ch. 108½, §18-1 et seq.) and therefore they do not benefit from the provisions of the mandatory retirement act suspending application of that act to permit each judge to fulfill such minimum eligibility standards, Ch. 37 Ill. Rev. Stats. §23.71, §23.72. However, under the Judges Retirement System of Illinois as aforesaid, the vested pension right of each judge increases with the number of years he serves. Thus, each Judge Plaintiff will, if forced to retire at the end of 1978, pursuant to mandatory retirement provisions, lose substantial pension rights which would otherwise have vested in them by reason of continued service as judges. Moreover, the Judge plaintiffs are treated differently than judges protected from retirement at age 70 by §23.72 as amended in 1973, as are many members of the Judges class.

25. By reason of the mandatory retirement provisions applicable to judges, the Judge Plaintiffs and each of them are about to lose their judicial positions without any fault on their part and without a showing of any misconduct or demonstrated physical or mental inability to serve pursuant to the hearings and procedural requirements for discipline or removal of judges, as is required and provided by the Constitution of Illinois and Rules of Illinois Supreme Court as aforesaid; while judges who have not attained 70 years of age are entitled to hold office unless removed or disciplined pursuant to those Illinois Constitutional requirements and Supreme Court

Rules, and while many other judges older than 70 years of age were and are protected and remain eligible to continue in judicial office by reason of the 1965 "grandfather clauses" and 1973 savings clause and amendment. Further the Judge Plaintiffs are denied their rights to run for retention or re-election to judicial office.

26. The Mandatory Retirement Act, Ch. 37 Ill. Rev. Stats. §23.71, §23.72, which operates to remove judges from office at age 70 is not rationally related to any legitimate object of that Statute or the State of Illinois, in that:

(a) No state purpose for the mandatory retirement of judges at age 70 is articulated in the Act;
(b) No identifiable State purpose exists for the mandatory retirement of judges at age 70;
(c) No relationship exists between forced retirement at age 70 and an individual judge being unfit to perform his judicial duties after age 70; and
(d) No judges who are unfit are excluded by the Act, or in the alternative so few judges who are unfit are excluded, as to render the age 70 classification unrelated to the objective of the State, if in fact the State's objective is to exclude unfit judges.

27. The Mandatory Retirement Act, Ch. 37 Ill. Rev. Stats. §23.71, §23.72, denies Plaintiffs Trafelet, Canel, Nelson and Carey, who are otherwise qualified, and the members of their class the right to seek judicial office and also denies Plaintiffs Fitzpatrick, Williams and Lewis and the members of their class the right to vote for the judicial candidates of their choice and dilutes and nullifies their votes in the past. No compelling state purpose is cited in the Act, nor does a compelling state purpose exist for the denial of the above stated fundamental rights.

28. By reason of forced retirement, Plaintiffs Trafelet, Canel, Nelson, and Carey and the members of the class they represent will shortly be deprived of the right to hold their judicial office to the expiration of their respective terms and/or will shortly be deprived of the right to be eligible to seek retention or election to judicial office in the future.

29. By reason of forced retirement, Plaintiffs Nelson, Trafelet and Carey and the members of the class they represent are and will be deprived of the right to hold their respective offices until the completion of their respective terms, and therefore will suffer diminutions in income and be deprived of the opportunity to contribute to judicial service to which they have been elected by law and vote of the electorate. By reason of forced retirement Plaintiff Canel and the members of the Judges class represented by Plaintiffs are and will be deprived of the right to seek retention in elected office and therefore will suffer diminutions in income.

30. Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent will suffer physical and mental harm to their well-being by reason of the cessation of active employment in their chosen profession and the change in living conditions necessitated thereby.

31. Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent will experience pension payments smaller than those they would receive were they allowed to continue in or seek retention in their office. Moreover, these Judge Plaintiffs and members of the class they represent are barred from further contributing to their pension fund after retirement, thereby barring their ability to increase their retirement income.

32. By reason of the forced retirement of Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent, these Judge Plaintiffs and other judges are stigmatized by being in effect designated as unsuited for performing in their professions, thereby impairing their future employment opportunities.

33. By reason of forced retirement of Plaintiffs Trafelet, Canel, Nelson and Carey, and members of the class they represent, these Judge Plaintiffs and other judges

are damaged in their standing in their communities by being discharged from their employment and thereby being in effect designated as unsuited for performing in their professions. No equivalent employment is, or will be, available to them following their forced retirement.

34. By reason of the forced retirement of Plaintiffs Nelson, Trafelet, Canel and Carey and the members of the class they represent, Plaintiffs Fitzpatrick, Williams and Lewis and the members of the class they represent are not able and will not be able to vote for the judicial candidates of their choice for the elected office of judge.

35. Defendants are acting and will continue to act under color of the laws of the State of Illinois to deprive Plaintiffs Trafelet, Canel, Nelson and Carey, and the members of the class they represent of rights secured by the First, and Fourteenth Amendments to the Constitution of the United States in that:

(a) These Judges are forced to retire solely because they have reached age 70, without any regard to their abilities to perform their assigned duties, and with no due process rights being accorded them, with the result being they are subjected to arbitrary, capricious, and irrational deprivation of their rights otherwise under law to hold judicial office and to seek retention of judicial office and to seek election to judicial office, without due process of law, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) These Judges are involuntarily classified in a class characterized solely on the basis of age and thence subjected to arbitrary and invidious treatment by reason of such classification, in that they are deprived of judicial office, deprived of the right to retain their judicial office and deprived of the right to seek election to judicial office, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

(c) These Judges are being invidiously discriminated against because they are involuntarily retired and disqualified from holding judicial office and from seeking retention to judicial office and from seeking election to judicial office, all without any cause or procedural rights, on the sole basis of their having attained the age of 70, whereas (1) all other Judges can be removed only pursuant to the disciplinary provisions of the Illinois Constitution and Illinois Supreme Court Rules, and only after being accorded full due process rights including written charges, a hearing, representation by counsel, the opportunity to offer evidence and witnesses, maintenance of a record, and other procedural steps provided pursuant to the Illinois Constitution and procedures of the Judicial Board and Courts Commission; (2) many other judges have been and are protected by the "grandfather clauses" of the retirement act, so as to remain in office for 18 years, many years after attaining the age of 70; (3) other persons who qualify under Article 6, §11 to seek election to the judiciary may do so, whereas Plaintiffs and the class they represent are barred from doing so solely because of their age; (4) all other elected officials who reach the age of 70 in the State of Illinois are not so barred; (5) other judges are permitted to acquire longer years of service and therefore longer pension rights; and (6) other judges were protected by the savings clause enacted as amendement to §23.72 in 1973, so as to remain in office until achieving minimum retirement benefits, many years after attaining age 70.

(d) Many judges in the Judges' class are entitled to seek retention but did not file for retention by the first Monday in December, 1977, pursuant to Public Act 80-1057 as aforesaid because they believed themselves to be disqualified from retention by the mandatory retirement provisions complained of herein. Because they had only a few weeks to

file under that Public Act after it became effective, they had no conceivable time to seek within that period a declaration of their rights as prayed for herein. By cutting short the filing date for retention under Public Act 80-1057, rather than permitting such filing by May 7, 1978, as permitted by the Illinois Constitution, that Public Act acts in conjunction with the mandatory retirement provisions complained of to deny these members of the Judges' class their rights under the First, Fifth and Fourteenth Amendments for the reasons set forth in subparagraphs (a), (b), and (c) hereof.

36. Defendants are acting and will continue to act under color of the laws of the State of Illinois to deprive Plaintiffs Fitzpatrick, Williams and Lewis and the members of the class they represent of rights secured by the First and Fourteeenth Amendments to the Constitution of the United States in that duly registered voters are denied the opportunity to vote for the judicial candidates of their choice.

37. Both the Judge Plaintiffs and the Voter Plaintiffs and the members of the classes they represent have no adequate remedy at law to redress the wrongs alleged herein. All the Plaintiffs and the members of the classes they represent face imminent and irreparable injury from the actions of the Defendants, as set forth herein, unless restrained by this Court. An actual controversy exists between the parties hereto.

WHEREFORE, Plaintiffs Trafelet, Canel, Nelson and Carey pray that this Court certify them to be representatives of the class they represent and Plaintiffs Fitzpatrick, Williams and Lewis pray that this Court certify them to be representatives of the class they represent. All the Plaintiffs further pray that this Court enter judgment as follows:

A. That the Court declare the rights of the parties, including the Plaintiffs and the classes represented by them, and declare:

(1) that the Illinois Act relating to compulsory retirement of judges, Laws 1965, p. 1792, §1, §2, as amended by P.A. 78-805, §1 [Chapter 37, Ill. Rev. Stats. (1975) §23.71, and §23.72, as amended] both on its face and as applied, and also Public Act 80-1057, Chapter 46, Ill. Rev. Stats. (1975) §7A-1 as applied to the Judges' class herein, be declared in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, by reason of depriving Plaintiffs and their classes, under color of law, of their rights, privileges and immunities without due process, and further because such Act deprives them of their rights to equal protection of the law;

(2) that the offices of Plaintiffs Trafelet, Nelson and Carey and other judges in the class they represent who will not have completed their certified terms of office by December 4, 1978, are and will not be vacant, after that date or until the completion of their respective certified terms of office, by reason of the aforesaid Act for compulsory retirement;

(3) that the Plaintiff Canel, and other judges in the Judges class whose certified terms will expire December 4, 1978, are not disqualified by the aforesaid Act for compulsory retirement to seek retention in office pursuant to Article 6 of the 1970 Constitution of Illinois, and that the offices of such judges who timely file by May 7, 1978 Declarations of Candidacy with the Illinois Secretary of State to succeed themseves are not vacant or subject to election of others.

(4) that any elections to fill any and all vacancies in judicial office created by reason of the said Act relating to compulsory retirement of Judges are null, void, and of no effect; and

(5) that the Judge Plaintiffs and the class they represent are not disqualified by reason of said

Act from running for election to judicial office in Illinois, or for retention to judicial office in Illinois.

B. That the Defendants and each of them, and their agents, servants, and attorneys, be preliminarily *pendente lite* and then permanently restrained and enjoined as follows:

(1) As to all Defendants, from enforcing or recognizing by any official act on their part the requirements of the aforesaid Illinois Act relating to compulsory retirement of judges;

(2) As to the Defendant Governor Thompson, from issuing certificates of election to any persons purportedly elected to the supposed vacancies created by effect of the said Act relating to compulsory retirement of judges;

(3) As to the Defendants Board and Board Members and their successors, from certifying any vacancies in judicial office and by certifying names of individuals as candidates to such vacancies by reason of said Act relating to compulsory retirement of judges, and from certifying any election of persons supposedly elected to judicial offices made vacant by reason of said Act and from not including on the judicial retention ballots in November, 1978 and subsequent years Canel and all judges who timely filed Declarations of Candidacy with said Defendant pursuant to the 1970 Constitution of Illinois, and without regard to the said Act for compulsory retirement of judges and the filing date set forth in Public Act 80-1057.

(4) As to the Defendant Controller Bakalis, from causing the Judge Plaintiffs and the class represented by these Plaintiffs to lose their compensation for their judicial offices by reason of said Act, and from causing new persons purportedly elected to vacancies created by said

Act to be paid any compensation for those judicial offices;

(5) As to the Defendant Director Gulley, from causing the Plaintiffs Trafelet, Canel and Nelson Carey and the class represented by these Plaintiffs to be removed because of mandatory retirement from the payroll of judges and from causing others to be placed on that payroll in their stead.

(6) As to the Defendant Secretary of State Dixon, mandatorily enjoining him to timely certify to the State Board of Elections and all appropriate election officials for inclusion on the judicial retention ballots in November of 1978 and subsequent years all judges who timely file Declarations of Candidacy with said Defendant pursuant to the 1970 Constitution of Illinois, and without regard to the said Act for compulsory retirement of judges and without regard to the filing date provided in Public Act 80-1057.

C. For such other relief as may be just and equitable in the premises, and for their costs.

COUNT II

1. This Court has pendent jurisdiction of this Count. • • • •